Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

KENNETH R. GIBSON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Writ of Certiorari should be granted because the Kentucky State District Court of Hardin County upheld a decision which grossly violates the principles in *In Re Winship,* 397 U.S. 253, 89 S.Ct. 436, 21 L. Ed. 23 415 (1968) in that a conviction was allowed without a crucial element of the crime being proven.

LIST OF PARTIES

The Petitioner is Kenneth Gibson, an individual. The Respondent is the office of the Hardin County Attorney in Elizabethtown, Kentucky.

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OPINIONS BELOW

The Kentucky Supreme Court issued its decision on August 26, 1998. A copy of this decision is included in Appendix A, page la. The Kentucky Court of Appeals entered its unpublished order on January 15, 1998. It is included in Appendix B, on pages 2a and 3a. The Hardin Circuit Court, in Hardin County Kentucky, issued its opinion on October 22, 1997. A copy of this decision is included herein in Appendix C. It is on pages 4a through 7a. The order of the trial court was entered on August 21, 1997. A copy of this order is included in Appendix D. It is on 8a, 9a, and 10a.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §§ 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV § 1

Sec. I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, arc citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A conviction was allowed in the Hardin District Court even though a crucial element of the offense was not proved. By Kentucky Law, you have to prove that a breathalyser machine is in proper working order before evidence of it can be used at trial. In this case, it was allowed. The Court allowed the prosecutor to comment in opening statement both about it and the ultimate issue to be decided.

ARGUMENT I

Because in *In Re Winship,* supra, requires each and every element of a crime to be proven beyond a reasonable doubt and as the Commonwealth could not prove that the breathalyser machine was in proper working order in this action, the Petition for Certiorari should be granted.

It was crystal clear in the case of *Owen v. Commonwealth,* Ky., 487 S.W.2d 897 (1972) as to what tests are required before a breathalyser result can be admitted at trial. In the action herein, the officer testified that he did not know whether or not the machine had been maintained properly. As such, Defense moved both orally and in writing to exclude the results of the breathalyser in this case. These motions were overruled.

The *Owen* case above stated that before a breathalyser result could be entered there had to be: 1) a trained and certified operator; 2) the Commonwealth had to prove that the machine was in proper working order and; 3) that the procedures used in taking the breathalyser were proper. It is

obvious in the action herein that the breathalyser of . 175 taken was improper. It is obvious in the action herein that the breathalyser of .175 taken was improper. The Commonwealth must show that the machine was in proper working order. At trial they were not even able to show that the machine had been properly maintained. As such, the breathalyser evidence of a. 175 should have been excluded from evidence. The Movant made oral and written objections, included herein as Appendices E and F.

> . . . [2] [3] The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula beyond a reasonable doubt seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt . . . *In Re Winship, supra*, at p.3. See also: *C. McCormick, Evidence,*, s 321, pp. 681-682 (1954): See as well *9J. Wigmore, Evidence,* s 2497 (3d. 1940).

There is no question that this was prejudicial error and its merits requires the granting of a writ of certiorari. No evidence could be worse than the. 175 on the breathalyser. (In Kentucky one is presumed to be driving while intoxicated at .10. KRS. 189A.010).

ARGUMENT II

BECAUSE THE POLICE OFFICER AT TRIAL WAS ALLOWED, OVER OBJECTION BOTH ORALLY AND IN WRITING OF DEFENSE, TO TESTIFY THAT THE MOVANT WAS "INTOXICATED", REVERSIBLE ERROR OCCURRED A WRIT OF CERTIORARI SHOULD BE GRANTED.

At trial over the oral and written objections of the Movant, (App. F) the police officer was allowed to testify that the Movant was intoxicated. The Defense objected on the grounds that this both constituted a legal conclusion and went to the ultimate issue to be decided. Nevertheless, the Judge allowed such evidence in. This ruling was contrary to law and a Writ of Certiorari should be granted.

It has always been clear that a party cannot testify as to the ultimate issue to be decided.

> ... It is reversible error to permit a witness to express such opinion if the fact of intoxication is the ultimate issue in the case. Cf. *Brown v. Commonwealth,* Ky., 812 S.W.2d 502 (1991); *Commonwealth v. R Rose,* Ky., 725 S.W.2d, 588,591 (1987); *Pendleton v. Commonwealth,* Ky., 685 S.W.2d 529, 553 (1985).

For this reason also a Writ of Certiorari should be granted.

ARGUMENT III

BECAUSE THE COMMONWEALTH WAS ALLOWED TO TALK IN OPENING STATEMENT BEFORE THE JURY THAT THE BA READING IN THIS CASE WAS A .175, AND AS THE COMMONWEALTH WAS NOT EVEN ABLE TO SHOW THAT THE MACHINE OPERATED PROPERLY A WRIT OF CERTIORARI SHOULD BE GRANTED.

During the opening statement the Assistant County Attorney began talking about the breathalyser. The Defense made a motion to prohibit such statements in opening because they might not be able to actually prove the elements to allow the breathalyser reading into evidence. As a matter of fact, it turned out to be exactly what happened. The Movant objected both orally and in writing. Said objection is included as Appendix E. The Movant now requests that a Writ of Certiorari be granted on these grounds. Again, *In Re Winship,* supra. See also; *Miles v. United States,* 103 U.S. 304, 312, 26 L. Ed. 481 (1881); *Davis v. United States,* 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L.Ed. 499 (1895); *Holt v. United States,* 218 U.S. 245,253, 31 S.Ct.2, 6, 54 L.Ed. 1021 (1910).

CONCLUSION

For the reasons stated herein, the petition for a Writ of Certiorari should be granted. Petitioner further suggests that under the remarkable facts presented, that this Court is empowered to *sua sponte* reverse the decision herein and dismiss it on double jeopardy grounds.

/s/_____
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(502) 766-5160

APPENDIX A

SUPREME COURT OF KENTUCKY
98-SC-89-D
(97-CA-2816)

KENNETH GIBSON,	) HARDIN CIRCUIT COURT
Movant,	) 97-XX-22
	)
v.	) (Filed August 27, 1998)
	)
COMMONWEALTH OF	)
KENTUCKY,	)
Respondent.	)

_____/

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 26, 1998.

/s/_____
Robert F. Stephens
Chief Justice

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 97-CA-2816-D

APPEAL FROM HARDIN CIRCUIT COURT
ACTION NO. 97-XX-22

KENNETH GIBSON, Movant,	)
v.	) (Filed January 20, 1998)
COMMONWEALTH OF KENTUCKY, Respondent.	)

ORDER

BEFORE: BUCKINGHAM, GARDNER, AND SCHRODER, JUDGES

Having considered movant's motion for discretionary review, and the response thereto, and being otherwise advised, this Court ORDERS that this motion be, and it is hereby, DENIED.

ENTERED: January 15, 1998

/s/_____
David C. Buckingham
JUDGE, COURT OF APPEALS

APPENDIX C

HARDIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 97-XX-00022

APPEAL FROM HARDIN DISTRICT COURT
ELIZABETHTOWN DIVISION
HON. KIMBERLY W. SHUMATE, PRESIDING JUDGE
CASE NO. 97-T-01079

KENNETH GIBSON,)
Appellant,)
)
v.) (Filed October 22, 1997)
)
COMMONWEALTH OF)
KENTUCKY,)
Appellee.)
_____/

AFFIRMING

The Appellant, Kenneth Gibson, was convicted by a district court jury on August 21, 1997 of the offense of Operating a Motor Vehicle With Alcohol Concentration of .10 or Above, first offense, under KRS 189A.010. He alleges four errors in his Appeal to this Court.

First, Appellant argues that the breathalyzer test should not have been admitted into evidence because the testifying officer did not know whether or not the machine had been maintained properly. Appellant relies on the old (relatively speaking) case of Owens v. Commonwealth, Ky., 487 S.W.2d 897 (1972) wherein the Court of Appeals held that in order for a breathalyzer test to be admissible, the proof must be that: 1) the operator was properly trained and certified to operate the machine, 2) that the machine was in proper working order and 3) that the test was administered according to standard operating procedures. Appellant argues that in order to show that the breathalyzer is in proper working order, the Commonwealth must produce testimony beyond that of the officer administering the test. That is not the law in Kentucky. Our Supreme Court, in the recent case of Com. v. Wirth, Ky., 936 S.W.2d 78 (1997) recognized the fundamental requirements for the admission of a breathalyzer test as set forth in Owens along with the additional requirements established by KRS 189A.103(3)(a), KRS 189A.103(4) and 500 KAR 8:020(2). The Supreme Court specifically held that it is unnecessary to produce the testimony of the technician who serviced and calibrated the machine in order for the results to be admissible. In the case before the Court, the Court has reviewed the tape recorded record and is of the opinion that the prosecutor met all of the foundational requirements set forth in Wirth and therefore the breathalyzer test result was properly admitted into evidence by the trial court.

Appellant's next argument is that the trial court incorrectly allowed the arresting officer to testify that in his opinion the Appellant was intoxicated. Appellant argues that

opinion testimony in a DUI case as to intoxication amounts to testimony as to the ultimate issue, which is clearly not admissible in Kentucky. Whether or not opinion testimony on the issue of intoxication is admissible in DUI cases in Kentucky has been the subject of considerable debate. Finally, our Court of Appeals has resolved the issue. Unfortunately for the Appellant, it was not decided in his favor. In the very recent case of Com. v. Rhodes, Ky. App., 949 S.W.2d 621 (1997) the Court of Appeals held as follows:

> We likewise agree with the Commonwealth that the opinion testimony of the state trooper on the issue of intoxication was admissible. "[A] conviction may stand upon the testimony of the police without resort to the various devices. Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 37 (1994). Trooper Gooser observed appellee's driving and physical condition before administering the various and sundry tests for inebriation. Gosser was thus qualified as a witness, both lay and expert, to offer his opinion that Rhodes was intoxicated. Id. at 623

The trial court again quite correctly allowed this testimony to be introduced, and Appellant's argument to the contrary is without any basis in the law.

The remaining arguments advanced by the Appellant have to do with statements made by the commonwealth during opening statement. One of those statements was that part of the evidence would be the results of a breathalyzer test.

Certainly there is nothing wrong with telling the jury what you believe the evidence will show. Since the breathalyzer test result was properly admitted in this case, the prosecutor's comments about same in his opening statement can not possibly be inappropriate.

Likewise, the Appellant complaints about comments made by the prosecutor concerning a potential expert witness which the Appellant planned to call. The court has listened to the tape and heard nothing inappropriate, and certainly nothing which the Court could or would characterize as "belittling" the Appellant's expert witness.

Kentucky allows great leeway to both sides in arguments to a jury. Slaughter v. Com., Ky., 744 S.W.2d 407 (1988) Nothing occurred in the case before the Court with respect to opening argument that deprived the Appellant of a fair trial.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the verdict of the Hardin District Court entered on August 21, 1997 finding the Appellant guilty of Operating a Motor Vehicle with Alcohol Concentration of .10 or Above is AFFIRMED.

This 22nd day of October, 1997.

/s/_____
T. STEVEN BLAND, JUDGE
HARDIN CIRCUIT JUDGE
DIVISION I

APPENDIX D

SENTENCING ORDER (D.U.I.)

COMMONWEALTH OF KENTUCKY Plaintiff, v. KENNETH R. GIBSON Defendant.	) CASE NO. 97-T-1079) Filed August 22, 1997

Defendant having been found guilty by X trial by jury of the offense of operating a motor vehicle while under the influence of alcohol or any other substance:

X First offense within 5 years

IT IS HEREBY ORDERED AND ADJUDGED as follows:

X Defendant is to pay a fine of $375 and Court costs of $72.50 on or before pending appeal.

X Defendant shall pay a service fee of $200.00 which may be reduced by the fee paid for alcohol treatment or education program upon proof to the Hardin

District Clerk.

X Defendant shall surrender his Kentucky operator's license immediately to the Hardin District Court Clerk. Notice of appeal filed simultaneously.

X Pursuant to KRS 189A.040 the Defendant **shall** attend and complete an alcohol or substance abuse education or treatment program licensed, regulated and monitored by the Commonwealth of Kentucky, Cabinet for Human Resources, such as Communicare, 1311 North Dixie Avenue, Elizabethtown, Kentucky 42701, (502) 769-1304. The treatment shall provide an assessment of the Defendant's alcohol or other substance abuse problems, which shall be performed at the start of the program. . . .

First offense within a 5 year period: 90 days

X The Defendant shall have his license to operate a motor vehicle or motorcycle revoked as provided in KRS 189A.070 as follows: (a) First offense within a 5 year period: 90 days; (b) Second offense within a 5 year period: 12 months; (c) Third offense within a 5 year period: 24 months; and (d) Fourth or subsequent offense within a 5 year period: 60 months. If the Defendant refused to take an alcohol concentration or substance test the Defendant's license to operate a motor vehicle or motorcycle shall be suspended as provided in KRS 189A.107.

X Defendant's fine of $375 tcct service and/or jail

sentence of _____ is/are suspended pending appeal.

This the 21st day of August, 1997

/s/_____
Kimberly W. Shumate
JUDGE, HARDIN DISTRICT COURT

APPENDIX E

COMMONWEALTH OF KENTUCKY
HARDIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY Plaintiff, v. KENNETH R. GIBSON Defendant.	) CASE NO. 97-T-1079) Filed August 21, 1997

TRIAL OBJECTIONS

Come the Defendant, KENNETH GIBSON, by counsel, and objects to the Trial Court's Ruling that:

> Motion before trial to prohibit talking about BA in opening and voir dire was overruled.

This Objection is made on the grounds that said ruling violates Defendant KENNETH GIBSON'S Federal Constitutional Rights to due process of law under the 5th and 14th Amendments, right to a fair trial under the 6th Amendment, and right to be protected from cruel and unusual

punishment under the 8th Amendment to said Federal Constitutional.

Additionally, said due process, fair trial, and protection from cruel and unusual punishment rights have been violated pursuant to Defendant's State Constitutional Rights under Sections 1, 2, 3, 7, 11 and 17 of the Kentucky State Constitution.

Respectfully submitted,

/s/_____

James A. Maples, Attorney
Maples, Holbert, Gregory,
Pearl & Dunaway
58 Public Square
Elizabethtown, KY 42701

APPENDIX F

COMMONWEALTH OF KENTUCKY Plaintiff,	) CASE NO. 97-T-1079
v.	) Filed August 22, 1997
KENNETH R. GIBSON Defendant.	)

TRIAL OBJECTIONS

Comes the Defendant, KENNETH GIBSON, by counsel, and objects to the Trial Court's Ruling that:

> In Openings Prosecutor Allowed to testify about defenses regarding experts over objections of defense.

This Objection is made on the grounds that said ruling violates Defendant KENNETH GIBSON'S Federal Constitutional Rights to due process of law under the 5th and 14th Amendments, right to a fair trial under the 6th Amendment, and right to be protected from cruel and unusual punishment under the 8th Amendment to said Federal Constitutional.

Additionally, said due process, fair trial, and protection from cruel and unusual punishment rights have been violated pursuant to Defendant's State Constitutional Rights under Sections 1, 2, 3, 7, 11 and 17 of the Kentucky State Constitution.

Respectfully submitted,

/s/_____

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